

# ORIGINAL

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12/06/2016

**Anderson, Diane***Ed Smith*CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: AF 09-0688

**From:** Dick Pence <rapence45@gmail.com>  
**Sent:** Monday, December 5, 2016 11:19 AM  
**To:** Court, SCclerk  
**Subject:** Rules of Conduct 8.4g  
**Attachments:** Pence on Rule 8.4 change.docx; Pitfalls of Rule 8 4(g) 2016-10-12 (1).pdf

**Importance:** High

Clerk of Supreme Court  
PO Box 203003  
Helena, MT 59620-3003

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DEC 06 2016

*Ed Smith*CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Re: Professional Rules of Conduct- Rule 8.4(g) Please Decline

Honorable Members of the Court,

12/3/16

In your order of October 26, 2016 regarding case number AF 09-0688 you have called for public comment on the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As Founder of the Big Sky Worldview Forum and Administrator of the Montana Pastors Network, I would like to submit my comments and **urge you to decline adoption of this rule** for the following reasons.

### 1. Suggests the Montana Supreme Court is "*Legislating from the Bench*"

At the national level, the comments to ABA have been overwhelmingly against this effort. Yet they have moved forward essentially disregarding public comment even from those within their own ranks. The ABA Committee on Ethics' Memorandum of December 22, 2015, explaining the purpose of the proposed rule change favorably quotes the sentiment that there is "a need for a cultural shift in understanding the inherent integrity of people..." In other words, the rule change was not proposed for the sake of protecting clients, for protecting attorneys, or for protecting the court. It was proposed because the American Bar Association felt the need to promote a cultural shift. This is clearly social engineering and legislating from the bench. It is outside the auspices of the court. Such an expansion of the purpose of the court threatens the very fiber of the judicial estate. This will not set well with the citizens of Montana and they will find out.

### 2. A Danger to Religious Freedom.

If our lawyers find themselves under the threat of discipline by associating themselves with religious organizations that hold certain beliefs connected to sexual orientation, gender identity or marital status – churches and non-profits will find themselves without competent legal counsel. The lack of access to such legal advice may create a serious threat to religious freedom in Montana bringing about a chilling effect on lawyers who will be reluctant to grant pro-bono work, or to sit on the governing boards of congregations or not-for-profit organizations.

### 3. A Threat to Freedom of Speech.

This reeks of Progressive Activism – the incremental changing of culture like moves in a chess match. Intelligent Montanans will see through this and you do not want to project this image. By the adoption of this rule Montana Lawyers will find their "verbal conduct"<sup>[i]</sup> severely limited, even in social activities. This limitation on free speech is a dangerous precedent and unconstitutional as you know. This

incremental erosion is of great concern. Who will be next? A threat to the freedom of speech for one class is a threat to the freedom of speech for all. Lawyers with religious beliefs will feel the need to limit their clientele. The adoption of this rule, threatens their very livelihood on the basis of their speech. If they speak their beliefs they may be disciplined.

#### **4. Vague Language Opens the Door to Legal Mischief**

The language in this new rule is so vague that it invites legal-political mischief. On one day, the court may say “a lawyer can offer advice to a group on protection about hiring.” On the next day (or a different court) may rule exactly the opposite because of the lack of boundaries of this action. Further, the rules for the professional conduct of attorneys ought not to contain circular reasoning. The final sentence of the proposed rule states, “This paragraph does not preclude legitimate advice or advocacy consistent with these rules.” Since Rule 8.4(g) is included in “these rules,” the effect of this sentence is, “Rule 8.4 does not preclude legitimate advice consistent with rule 8.4.” This is verbal gobbledygook that can be interpreted according to the whim of the administrator.

#### **5. Hijacks the Purpose of the Court.**

Once the court determines that it is to be the arbiter of cultural values, instead of interpreting the law, it crosses a bridge that ends in the crumbling of the rule of law.

#### **6. An Escalation of Class Warfare.**

Comment 4 to Rule 8.4(g) says that “Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees...” This rule will provide the foundation for intensifying class warfare. The favored classes will enjoy the support of Montana attorneys. The disfavored classes will suffer. A lawyer would face discipline if he were to say, “I will hire you because you are a white male.” A lawyer would be free to say, “I will hire you because you are a lesbian.”

On the basis of the above reasoning I urge the court not to adopt the proposed change to Rule 8.4 of the Professional Rules of Conduct.

Sincerely,

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